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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 510

ANTHONY GIANFRANCESCO, *Petitioner*,

v.

STATE OF OHIO, *Respondent*

PETITION FOR WRIT OF CERTIORARI

TO

SUPREME COURT OF OHIO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

NO.....

ANTHONY GIANFRANCESCO, *Petitioner*

vs.

STATE OF OHIO, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF OHIO

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered on the 18th day of March, 1964, motion for a rehearing being denied on April 22, 1964.

CITATIONS TO OPINIONS BELOW

The trial court, Mahoning County, Ohio, issued no written opinion. The decision of the Court of Appeals Seventh Judicial District, State of Ohio, is unreported, but the Appellate Court did issue a written opinion (Appendix A, page 13). The decision of the Supreme Court of Ohio is unreported. The Supreme Court journalized their entries dismissing the appeal for the reason that no substantial constitutional question exists and overruling the motion for leave to appeal (Appendix A, pages 18-19).

JURISDICTION

The judgment of the Supreme Court of the State of Ohio, was entered on March 18, 1964, (Appendix A, pages 18-19) a timely motion for rehearing was denied on April 22, 1964, (Appendix A, page 20). An application for an extension of time in which to file a Petition for Writ of Certiorari was granted by the Honorable Potter Stewart, Associate Justice

of the Supreme Court of the United States extending the time in which to file said Petition for Writ of Certiorari to September 19, 1964.

The jurisdiction of this court is invoked under the provisions of 28 U. S. C. 1257 (3), since the constitutional rights of the Petitioner as protected by the Fourth and Fourteenth amendments of the Constitution of the United States have been violated.

QUESTIONS PRESENTED

(1) Whether the trial court violated the constitutional rights of the Petitioner, as protected by the IV and XIV Amendments of the Constitution of the United States, by failing to sustain a motion to suppress certain evidence, introduced by the State of Ohio, which had been obtained as a result of an unlawful arrest of Petitioner without a warrant and a search of Petitioner's car without a warrant at the time of said unlawful arrest.

(2) Whether the trial court violated the constitutional rights of the Petitioner as protected by the XIV Amendment of the Constitution of the United States by making a statement to the jury, in open court after the jury had been deliberating several hours, limiting the time in which the jury had to deliberate and reach their verdict, thereby coercing the jury to act.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

AMENDMENT XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

On August 17, 1962, at approximately 3:45 P.M., the Petitioner was seated in a 1957 Buick automobile in the parking lot adjacent to the Atlantic Mills Department Store on Belmont Avenue in the City of Youngstown, Ohio, (Appendix B, page 22.) Petitioner had just purchased a bathing suit at said store (Appendix B, page 28).

The Petitioner was first seen by Youngstown City police officers Robert R. Zins and Francis J. Gallagher; Patrolman Zins was a "rookie" patrolman, having been appointed to the Youngstown Police Department on the 18th day of September, 1961, and the major portion of his eleven months' experience as a policeman had been as a "beat" policeman in the Blue Division, during which period he had never made an arrest for a "numbers" or "bug" violation, and he had very little experience of any type in police work (Appendix B, pages 23-24).

At such time neither Patrolman Zins, nor his companion, Patrolman Gallagher, had a warrant for the arrest of this defendant, nor were they in the course of any investigation of this defendant (Appendix B, pages 24, 25, 30).

When Officers Zins and Gallagher first saw the Petitioner, he was seated in a parked automobile with the windows down; he was seated quietly; there was nothing unusual about his

appearance or activity indicating that he was engaged in any violation of law, nor did they have any reason to suspect that this Petitioner was engaged in such violation (Appendix B, pages 25-27, 30).

This Petitioner is not known to the police as a violent or desperate character, or one who would cause a police officer any threat or fear of harm or violence (Appendix B, pages 27, 33).

Upon sighting Petitioner, Officer Zins stated to Officer Gallagher, "Let's go and shake Booze up." ("Booze" being a nickname by which this defendant has been known since childhood.) (Appendix B, page 31).

Patrolman Zins further testified that he did not know whether Petitioner had anything at all to do with the slips found in the car. Both Patrolman Zins and Patrolman Gallagher testified that they had never seen the Petitioner writing a number slip, had never seen him sell a number slip, had never seen him receive any money in connection with the sale or exchange of number slips (Appendix B, page 29).

The record reveals further that Patrolman Zins approached and searched by visual examination and inspection the interior of the car, and that he was in and around the interior of the automobile for some four or five minutes before placing this defendant under arrest (Appendix B, page 34).

Officer Thomas Kelty, of the Vice Squad, Police Department of the City of Youngstown, Ohio, testified that this defendant was not a "backer" of the numbers game, and that the only "backers" known to him, as an "expert" and "authority" were George Economus, Frank Tarentino, the Naples Brothers, and one John Burnich (Appendix B, page 36).

Officer Kelty further testified that he had never seen this defendant writing a number slip, had never seen him sell a number slip, nor had he ever seen him receive any money in connection ith the sale or exchange of number slips (Appendix B, page 36).

The State of Ohio placed only three (3) witnesses on the stand. The entire case was based on the testimony of Officers Zins and Gallagher who made the arrest, and five (5) exhibits, (Appendix B, page 40) obtained at the time of said arrest. The trial court allowed the five (5) exhibits in evidence over objection. Officer Kelly was not involved in the arrest or search of Petitioner's car but testified as an expert on behalf of the State of Ohio. Without the five (5) exhibits the State of Ohio could not prove a case.

At the close of all the evidence and the trial court's charge, the jury retired to deliberate. At approximately 2:30 in the afternoon the jury requested the court for further instructions which the trial court granted. An hour later at 3:30 p.m., the jury was called into the court room and the trial court advised the jury, "You will have to stay until you reach a verdict." And then, in substance, advised the jury to go out and try for another half an hour and then report to the court (Appendix B, page 39). At the time the trial court made this statement to the jury, the foreman, at the court's request, advised the court, "We are closer to a verdict, but I don't know whether we will ever reach one, to tell the truth." (Appendix B, page 40).

At the time that this statement was made by the trial court to the jury, the jury had been deliberating several hours, and within a half hour after this statement was made by the trial court the jury returned a verdict of "Guilty" against the Petitioner.

MANNER IN WHICH FEDERAL QUESTION WAS PRESENTED

A motion to suppress the evidence obtained as a result of the unlawful arrest without a warrant and the search of Petitioner's car without a warrant was filed on the 10th day of December, 1962 (Appendix C, page 42). During the trial of said case counsel on behalf of Petitioner objected to the admission of the exhibits obtained as a result of said

arrest and search for the reasons that it violated the Petitioner's constitutional rights (Appendix B, pages 38, 39). The trial court allowed the exhibits into evidence over said motion and objections.

The question concerning the statement of the trial court to the jury, which coerced the jury to act, (Appendix B, page 39) was raised by assignments of error and brief on appeal to the Court of Appeals, Seventh Judicial District, State of Ohio and the Supreme Court of the State of Ohio, for the reason that the constitutional rights of the Petitioner to a fair and impartial trial had been violated.

REASONS FOR GRANTING THE WRIT

POINT 1: THE UNLAWFUL ARREST AND UNLAWFUL SEARCH OF PETITIONER'S CAR

A Motion to Suppress Evidence is the bulwark against all transgressions of constitutional rights and is a veritable barrier against improper police conduct.

The great judicial concern and growing awareness of the necessity of preserving our basic constitutional guarantees against unreasonable search and seizure prohibited by the provisions of the Fourth and Fourteenth Amendments of the Federal Constitution is demonstrated by the powerful language contained in syllabi 3 and 4 of *Mapp vs. State of Ohio*, 367 U.S., 643; 6 L. Ed (2d) 1081 81 Sup. Ct. 1684 (1961) as follows:

> Syl. 3: "All evidence obtained by searches and seizures in violation of the Fourth Amendment to the Federal Constitution is, by virtue of the due process clause of the Fourteenth Amendment guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in a state court."
>
> Syl. 4: "The Fourth Amendment's right of privacy is enforceable against the states through the due process clause of the Fourteenth Amendment."

The historical justification and consideration necessary of such stringent approach in the prosecution of criminal cases is set forth in syllabus 8 of the Mapp case as follows:

> "However much in a particular case insistence upon observance by law officers of traditional fair procedural requirements may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness."

The Mapp case, supra, has revolutionized the entire concept of the "EXCLUSIONARY RULE" and in substance has held that any evidence obtained by search and seizure in violation of the Fourth Amendment of the Constitution of the United States is inadmissible in a state court as well as in a federal court.

Since the decision in Mapp vs. State of Ohio, supra, on this subject the Supreme Court of the United States on January 14, 1963, in the case of *Wong Sun and James Wah Toy vs. United States*, 371 U.S. 471, Volume 9, L. Ed. 2, 441, 83 S. Ct. 407 again passed on this question:

> Syl. 3: "An arrest with or without a warrant must stand upon firmer ground than mere suspicion, though the arresting officer need not have in hand evidence which would suffice to convict; the quantum of information which constitutes probable c a u s e — evidence which would warrant a man of reasonable caution in the belief that a fellony has been committed — must be measured by the facts of the particular case."
>
> Syl. 4: "ABUSE OF POWER — PROBABLE CAUSE. "The history of the use, and not infrequent abuse, of the power to arrest, cautions that a relaxation of the fundamental requirements of probable cause would leave law-abiding citizens at the mercy of the officers' whim or caprice."

Syl. 10: "A vague suspicion cannot be transformed into probable cause for arrest by reason of the suspect's ambiguous conduct which the arresting officers themselves have provoked."

Syl. 11: "SEARCH AND SEIZURE — VALIDATION BY RESULT.

"A search unlawful at its inception is not validated by what it turns up."

Syl. 12: "EVIDENCE — WRONGFULLY OBTAINED — ADMISSIBILITY.

"Evidence seized during an unlawful search cannot constitute proof against the victim of the search; the exclusionary prohibition extends as well to the indirect as the direct products of such invasion."

In the case of *John Patrick Henry vs. United States*, 361 U.S. 98,, 4 L. Ed. (2d) 134, 80 Sup. Ct. 168, FBI agents were investigating the theft of interstate shipment of whiskey and had received certain information from Defendant's employer concerning Defendant's implications with such interstate shipments. FBI agents had observed Defendant placing cartons in his car, but were unable to determine the size, number, or contents of the cartons, and later the agents stopped the Defendant's car and the Defendant was heard to say, "It's the G's" and the agents then searched the car and seized the cartons found therein. Later it was learned that the cartons contained stolen radios, whereupon Defendant was placed under formal arrest. The Supreme Court of the United States held that the agents had no probable cause at the time they stopped the car to believe that the Defendant was violating or had violated the law.

The following syllabi of the Henry case are directly in point in the present case:

Syl. 7: "While a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search it must be made with probable cause."

Syl. 11: "In determining probable cause justifying an arrest without warrant, the fact that contraband was afterwards discovered is not sufficient, since an arrest is not justified by what the subsequent search discloses."

Syl. 13: "Under the Fourth Amendment suspicion is not enough for an officer to arrest a citizen without warrant."

Syl. 14: "The Fourth Amendment teaches that it is better that the guilty sometimes go free than that citizens be subject to easy arrest."

Syl. 15: "The fact that suspects are in an automobile is not enough to justify a search of the automobile without warrant."

See also the following cases concerning the existence of probable cause for the making of an arrest without an arrest warrant and a search made in conjunction with said arrest without a search warrant. These cases hold that the search was illegally made and the evidence should be suppressed.

United States v. Di Re, 332 U.S. 581, 92 L. Ed. 210, 68 Sup. Ct. 222;
Johnson v. United States, 333 U.S. 10, 92 L. Ed. 436, 68 Sup. Ct. 367;
Miller v. United States, 357 U.S. 301, 2 L. Ed. (2d) 1332, 78 S. Ct. 1190;
Cervantes v. United States, 263 Fed. (2d) 800;
United States v Irwin, 86 F. Supp. 362;
United States v. Allen, 16 F. (2d) 320;
People v. Jordan, 37 Misc. (2d) 33, 234 N.Y.S. (2d) 323;
State v. Valentin, 74 N.J. Super. 502, 181 A (2d) 551;
State of Ohio v. Rogers, 198 NE (2d) 796.

The State's case against the Petitioner was based entirely upon evidence obtained as a result of the unlawful arrest and the unlawful search, both being made without warrant. From the facts as set out by the excerpts of the record taken

at the time of the trial of the case (Appendix B, pages 21-41) and the law as above set out, it is urged that the motion filed by the Petitioner to suppress the evidence and the objections made to the admission of such evidence should have been sustained for the following reasons:

1. That the search was prior to and not as an incident of arrest.

2. That the police officers had no justification or probable cause for arresting the Petitioner.

3. That the search of Petitioner's car, whether prior to or subsequent to an arrest, was without authority of law and in direct violation of the Petitioner's constitutional rights.

POINT 2: TRIAL COURT'S COERCIVE STATEMENT TO THE JURY

At page 142 of the record (Appendix B, page 39) the Trial Court made a statement to the jury, when they indicated that they were deadlocked, to the effect that they would have to stay until a verdict was reached.

Counsel for the Petitioner feels that this ill-considered action by the Trial Court, coming as it did after long hours of deliberation and at the end of a long and exhausting day for all concerned, in effect, constituted a directive or mandate by the Court to return a verdict within the time prescribed; that it had a coercive and intimidating effect on what the record reveals to be a sharply divided panel of jurors, and threatened them with prolonged confinement unless a judgment and verdict was returned. The words positively and unequivocally stated by the Court were: "You will have to stay until you reach a verdict." There was no limitation as to time placed on the Court's statement. The rule of reasonableness with respect to the deliberation or consideration by a divided panel was entirely discarded and the effect of this sharply worded directive cannot be over-emphasized.

Counsel for this Petitioner strongly contends that this statement standing alone constitutes irregularity of such magnitude that to sustain a verdict of guilty following such a statement would be a denial of due process, and a denial of the Petitioner's right to a fair and impartial trial.

In the case of *Boyett v. United States*, 48 F (2d) 482, Syllabus 10 states:

> "Remarks of court on jury's return for additional instructions *held* erroneous as tending to deprive defendant of fair trial.
>
> "Court remarked, at time jury returned for additional instructions, that it did not seem that there should be any great difficulty in arriving at a verdict, and instructed the marshall to prepare supper for jury and a place for them for the night and let them consider verdict after supper and until bedtime, and then permit them to retire until morning and after breakfast to return to jury room for further consideration of verdict."

A short time after this statement was made the jury returned with a verdict of guilty.

The Court concluded that the Judge's charges and remarks tended to deprive the defendant of a fair and impartial trial and required a reversal of the finding of guilty.

In the body of the opinion at page 484 the Court states as follows:

> "A federal judge is vested with considerable discretion in commenting on the facts before the jury and in reviewing the evidence, provided he does so fairly and presents both sides of the case, and also makes it clear to the jury that they are the sole ultimate judges of the facts, of the credibility of the witnesses, and of the weight and sufficiency of the evidence. However, when it is apparent that doubt exists in the minds of the jury, after having received the charge of the court and retired to deliberate, in delivering additional charges the judge

should exercise caution and refrain from indicating to the jury his own opinion as to the guilt or innocence of the defendant. It is also his duty to refrain from any intimidation or coercion of the jury. Kesley v. U.S. (C. C. A., 5th Circuit) 47 F. (2d) 453, decided March 5, 1931; Garst v. U.S. (C. C. A.) 180 F. 39; Oppenheim v. U.S. (C. C. A.) 241 F 625; Lewis v. U.S. (C. C. A.) 8 F. (2d) 849."

See also *People v. Josey*, (1963) 19 App. Div. (2d) 660, 241 N.Y.S. (2d) 620 in which a judgment of conviction was reversed although said conviction was warranted by the evidence where it was found that the trial judge's remarks and instructions to the jury when they reported failure to agree were coercive. See also *People v. Crowley*, (1950) 101 Cal. App. (2d) 71, 224 P. (2d) 748.

CONCLUSION

It is respectfully urged that the constitutional rights of the Petitioner as protected by the IV and XIV Amendments of the Constitution of the United States have been violated and that this Petition for Writ of Certiorari should be granted.

Edward L. Williams
W. Glenn Osborne

EDWARD L. WILLIAMS
W. GLENN OSBORNE
Counsel for Petitioner
1101-3 Union National Bank Bldg.
Youngstown, Ohio

Acknowledged Receipt of a
Copy of Foregoing Petition for
Writ of Certiorari this

.....day of ....., 1964

.....

Prosecuting Attorney
Mahoning County, Ohio

APPENDIX A

"STATE OF OHIO, MAHONING COUNTY"

"IN THE COURT OF APPEALS"
"SEVENTH DISTRICT"

"STATE OF OHIO,
PLAINTIFF-APPELLEE,
vs.
ANTHONY GIANFRANCESCO,
DEFENDANT-APPELLANT."

"OPINION"
"Case No. 4316"

"APPEARANCES"

"Clyde W. Osborne, Prosecuting Attorney, and Loren H. Van Brocklin, Assistant Prosecuting Attorney, Youngstown, Ohio, for Plaintiff-Appellee."

"Edward L. Williams and Jack W. Nybell, Youngstown, Ohio, for Defendant-Appellant."

"Hon. Paul W. Brown,
Hon. James G. France,
Hon. George M. Jones, JJ."

"Dated: October 15, 1963"

"Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio"

"JONES, J."

"Anthony Gianfrancesco was indicted by the Mahoning County, Ohio, Grand Jury, May Term 1962. He was charged with a violation of Revised Code Section 2915.13.

"On the tenth day of December, 1962, counsel for Gianfrancesco filed a motion to suppress evidence, which was subsequently overruled by the trial court. The case went to trial and a jury on the fourteenth day of February, 1963, returned a verdict of guilty as charged in the indictment.

"Subsequent to the trial defedant filed a motion for new trial and an application for probation. Both motion and application were overruled by the trial court, and Gianfrancesco was sentenced to a term of not less than one nor more than ten years in the State Penitentiary.

"The matter is now before this court on an appeal from the judgment of the Court of Common Pleas of Mahoning County, Ohio.

"On the seventeenth day of August, 1962, at about 3:45 p.m. Gianfrancesco was seated in a 1957 Buick automobile in a parking lot adjacent to the Atlantic Mills Department Store on Belmont Avenue in the City of Youngstown, Ohio. At this time a police officer of the city of Youngstown approached the vehicle in which Gianfrancesco was seated. The officer requested that Gianfrancesco hand to him certain pieces of paper that were lying on the front seat of the automobile. The paper slips were number tickets. Gianfrancesco was then placed under arrest, and a search was made of the automobile. Numbers slips were found lying on the front seat, underneath the front floor mat, and tucked between the crack of the front seat of the automobile. Gianfrancesco was then taken by the officer to the Youngstown Police Department, where an affidavit and warrant for arrest were immediately obtained.

"The first assignment of error charges that the trial court erred in overruling Gianfrancesco's motion to suppress evidence. This evidence, of course, was the slips and tally sheets obtained as the result of the search conducted in the Buick automobile at the parking lot.

"Section 2915.13, Revised Code, states as follows:—

" 'No person shall establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn,

paid, or carried on within or without this state, or by any of such means sell or expose for sale anything of value.

" 'Whoever violates this section shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than ten years.' "

"It has been held that where the violation of a criminal statute carries a penalty of a substantial fine and imprisonment for a period of one or more years and the person convicted under the statute is sentenced to the penitentiary, his offense is classed as a felony. Ex parte Thorpe, 66 Ohio App., 128, 32 N. E. (2nd), 571, affirmed, 137 Ohio St., 325, 30 N. E. (2d) 335.

"Section 1.06, Revised Code, states as follows:—

"Offenses which may be punished by death or by imprisonment in the penitentiary are felonies; all other offenses are misdemeanors. As used in the Revised Code 'minor offense' is synonymous with misdemeanor'."

"The Youngstown police officer had good reason to believe that Gianfrancesco was regularly engaged in carrying on a scheme of chance involving numbers tickets. The defendant was arrested, without a warrant, for what the arresting officer believed and had probable cause to believe was a commission of a felony. Section 2935.04, Revised Code, describes when an arrest may be made without a warrant, and reads as follows:—

" 'When a felony has been committed, or there is a reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."

"From the evidence it appears without question that the officer had probable cause for making the arrest.

"The United States Supreme Court in the case of Henry v. United States, 361 U. S., 98, 102, 4 L. Ed. (2d), 134, 80 S. Ct., 168, said:—

> " 'Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed'."

"A question of fact is presented in each case, and when the facts within the knowledge of the police officer are sufficient to cause a reasonable and prudent man to believe that a felony has been committeed and that the accused has committed it, probable cause is present. State of Ohio v. Beck, 175 Ohio St. 73.

"A police officer is authorized, without a warrant, to arrest a person found to be in violation of the law, although such police officer has no such previous knowledge of the fact, if such police officer acts bona fide and upon such information as induces an honest belief that the person arrested is in the act of violating the law. See Porello v. State of Ohio, 121 Ohio St. 280.

"The remaining question, as respects this assignment of error, is then: Should the evidence obtained following the lawful arrest be suppressed as being "unlawfully obtained?" We think not. Once again we turn to the Beck case where the court held that:—

> " 'All searches and seizures without warrants are not prohibited by law. The search of an individual's person on the honest belief of an arresting officer, based upon probable cause that a felony has been committed, does not constitute an unlawful search, and incriminating articles seized during the search may properly be received in evidence against the individual at his trial for having in his possession such articles.' State v. Beck, 175 Ohio St. 73, syllabus 1."

"Coming now to the fifth assignment of error that the trial court erred in its supplement charge to the jury. We

are of the opinion that the giving to the jury of the definition of the word "promoting" was discretionary upon the trial court, and find no abuse thereof.

"For the final assignment of error appellant argues that the court called the jury into the courtroom during the course of their deliberations to determine whether or not there was a reasonable chance of soon reaching a verdict. The trial court said:—

" 'The Court: You are hard-working jurors.

"You will have to stay until you reach a verdict. So then I would ask you whether there is a reasonable chance of reaching a verdict. Who is your foreman?

"Jury Foreman: I am, Your Honor.

"The Court: What do you say?

"Jury Foreman: I wish I knew.

"The Court: Give you another half hour?

"Jury Foreman: We are closer to a verdict, but I don't know whether we will ever reach one, to tell you the truth.

"The Court: Well, why don't you go and try for another half hour and let the court know by the buzzer when you are ready and we will reconsider this matter at that time. All right. Thank you'."

"It is this language that appellant claims to be objectionable and prejudicial. We are unable to conclude that this language has such an obvious meaning one way or the other as to be objectionable.

"As to the other errors assigned we find nothing contained therein to the prejudice of this defendant.

"We are, therefore, of the opinion that the evidence properly justified the finding that Gianfrancesco was guilty as charged.

"The judgment of the Court of Common Pleas is hereby affirmed."

"Brown, P. J., Concurs.

France, J., Concurs.

"APPROVED:"

"GEORGE M. JONES," "*JUDGE*"

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Plaintiff-Appellee,
vs.
Anthony Gianfrancesco,
Defendant-Appellant.

To wit: Wednesday, March 18, 1964

1964 TERM
No. 38519
APPEAL FROM THE
COURT OF
APPEALS
For MAHONING
County

This cause, here on appeal as of right from the Court of Appeals for Mahoning County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this.....day of ..... 19.....

.....Clerk

.....Deputy

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO
City of Columbus
State of Ohio,

Plaintiff-Appellee

vs.

Anthony Gianfrancesco,

Defendant-Appellant

TO WIT: Wednesday, March 18, 1964

1964 TERM
No. 38519
MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR MAHONING COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Anthony Gianfrancesco.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio, certify that the foreging entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this.....day of....., 19.....

....., Clerk

....., Deputy

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.
State of Ohio,
Plaintiff-Appellee,
vs.
Anthony Gianfrancesco,
Defendant-Appellant.

1964 TERM
April 22, 1964
No. 38519
REHEARING

It is ordered by the Court that rehearing in this case is denied

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No..... Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court

this.....day of..... 19.....

.....Clerk

By.....Deputy

APPENDIX B

STATE OF OHIO, MAHONING COUNTY	ss.	DEFENDANT'S BILL OF EXCEPTIONS

IN THE COURT OF COMMON PLEAS

CASE NUMBER 21776

STATE OF OHIO,
Plaintiff

vs.

ANTHONY GIANFRANCESCO,
Defendant.

APPEARANCES:

ATTYS. EDWARD L. WILLIAMS and
JACK NYBELL,
On Behalf of the Defendant

ATTYS. LOREN E. VAN BROCKLIN and
CARROLL E. MATTER,
On Behalf of the State

DIRECT EXAMINATION OF OFFICER ROBERT R. ZINS

By Mr. Van Brocklin

Record — page 13 — 14 line 12

"Q Will you please state your name and address?"
"A Robert R. Zins, 417 Rhoda."
"Q Where are you employed, sir?"
"A Youngstown Police Department."
"Q And in what capacity are you employed?"
"A I am a patrolman on the Blue Division presently."
"Q I now direct your attention to August 17, 1962, and I now ask you what division of the police department you were assigned to on that day?"
"A I was with the Intelligence & Security Squad, Youngstown Police Department."
"Q I further ask you whether or not you were acting at that time as a plain-clothes man?"
"A Yes, I was."
"Q I further ask you whether or not you and another officer were operating Car Number 58 on that date?"
"A That is correct."
"Q Who was that other officer?"

Record — Page 14.

"A Francis Gallagher."
"Q On August 17, 1962, here in the State of Ohio, County of Mahoning, and the city of Youngstown, I now ask you whether or not about 3:45 p.m. on that afternoon you approached the Atlantic Mills parking lot up here on Belmont Avenue?"
"A That is correct, sir."
"Q When you approached that parking lot and you drove in what did you see, if anything?"
"A I saw Mr. Gianfrancesco's car parked about two aisles up from us from where we pulled in."
"Q Were you acquainted with Gianfrancesco?"
"A Yes, I was."

"CROSS EXAMINATION:" (Officer Robert R. Zins)

"By Mr. Nybeil."

Record — Page 23

"Q Officer Zins, when were you appointed to the Youngstown Police Department?"

"A September 18, 1961."

"Q So that in August of 1962 you had been a police officer for less than one year, is that correct?"

"A That is correct."

"Q I don't want to embarrass you, Officer, but what was the nature of your experience, what did you do before you were a policeman?"

"A I had just finished up college."

"Q And you didn't study criminology in college, did you?"

"A I had one course in criminology."

"Q Did your course in criminology embrace any study of what does or does not constitute a number or policy slip?"

"A No, it did not. It covered vice work, but it didn't cover that portion."

"Q So that you didn't acquire your familiarity and understanding of what is or is not a number slip while you were in college, is that correct?"

"A That is correct."

"Q After your appointment in September of 1961 were you in the Blue Division for awhile?"

"A That is correct. Until approximately January the 15th of '62."

"Q So that you were in blue for about six months?"

"A That is correct."

"Q During the three months you were in blue did you make any vice arrests, any numbers arrests?"

"A No numbers arrests, no."

"Q You were assigned to a beat, were you?"

"A I was on a beat, but no particular one."

"Q Just roving assignment?"

Record—Page 25

"A That is correct."

"Q And you were undergoing, I suppose, that training that any beginning policeman undergoes, is that right?"

"A On-the-job training, yes."

"Q On-the-job training?"

"A Yes."

"Q No special courses or study groups?"

"A Not up to that time, no."

"Q Now, then, you were assigned to the Vice or Intelligence Squad when?"

"A Around the 15th of January, '62."

"Q And are you on the Vice or Intelligence Squad now?"

"A No, I am not."

"Q You are back in blue?"

"A That is correct."

"Q And your rank is patrolman?"

"A That is correct."

"Q So it is a fair statement, Officer, isn't it, that you haven't had too much experience in police work, is that right?"

"A I suppose you could say that."

"Q And there is nothing wrong with it. Everybody has to start some place."

"A That is right."

"Q You are a rookie policeman or a new man, is that right?"

Record — Page 26

"A After you have a year in they usually stop calling you a rookie."

"Q All right. So that in August then you were still a rookie, August of 1962?"

"A I supppose I was."

Record — Page 28

"Q But you didn't have any warrant for Gianfrancesco?"

"A No, we did not."

"Q Either to arrest his person — is that right?"
"A That is right."
"Q —or to search his house, is that right?"
"A That is right."
"Q —or to search his car, is that right?"
"A That is correct."

Record — Page 29

"Q When you first saw Gianfrancesco all you saw was a man sitting in a car, wasn't it?"

Record — Page 30

"A That is correct."
"Q You didn't see him fighting with anybody?"
"A No."
"Q You didn't see him carrying on or creating any public disturbance?"
"A No, he was not."
"Q You didn't see him engaged in any act of violence with anybody else, did you?"
"A No, I did not."
"Q You didn't see him spitting on the sidewalk or violating any of the ordinances of the City of Youngstown, did you?"
"A No."
"Q You didn't see him violating any of the statutes of the State of Ohio, did you?"
"A No, he wasn't."
"Q I beg your pardon?"
"A No, he was not."
"Q That is right. And as you walked toward him you didn't see any violation of any ordinance or statute, did you?"
"A No."

(Page 34 line 13 through line 4, page 37):

"Q Was it a hot day?"
"A It was mild."
"Q A man perspire on a hot August afternoon if he is sitting in a car and the sun is shining?"
"A Usually does."

"Q Would you say that some people carry handkerchiefs in their right hip pocket?"

"A I do."

"Q So that if a man put his hand toward his right hip pocket he could be reaching for a handkerchief, couldn't he?"

"A That is correct."

"Q You didn't never find any gun on Booze, did you?"

"A No."

Record — Page 35

"Q You are not trying to say he was reaching in his pocket for a gun?"

"A No."

"Q When you searched him he didn't have a knife."

"A No."

"Q You are not saying he had a knife?"

"A No."

"Q When you saw his hand, at whatever distance you saw it he was putting his hand toward his right hip pocket, is that right?"

"A That is correct."

"Q Does that cause you to be suspicious as a police officer when you are walking towards a car and the man puts his hand in his hip pocket in broad daylight?"

"A No, normally, no."

"Q What?"

"A No."

"Q This is a much traveled parking center lot, isn't it?"

"A That is correct."

"Q And a man sitting alone in his car doesn't bother you as a policeman, does it?"

"A No."

"Q What?"

"A No."

"Q How long have you known Gianfrancesco?"

Record — Page 36

"A Approximately six months before the arrest."

"Q Gianfrancesco is not what you would call a violent character, is he?"

"A No, he is not."

"Q He isn't the kind of a guy who causes you as a policeman any threat or any fear?"

"A No."

"Q He is by no means a desperate character, is that right?"

"A That is right."

"Q As a police officer, you wouldn't put him in the same category with the other numbers men you might have heard of in Youngstown, would you?"

"MR. VAN BROCKLIN: Objection."

THE COURT: Objection sustained."

"MR. NYBELL: This witness has testified that he is a police officer, and he has known this man and he is familiar with the numbers operations. I want to find out the depth and extent of the familiarity."

"THE COURT: What is your question?"

"Q My question is this: you said that Gianfrancesco was not by police standards considered a dangerous character?"

"A No, he is not."

Record — Page 37

"Q Or desperate character?"

"A No, he is not."

"Q Or one addicted to violence?"

"A No, he is not."

Record — Page 39

"Q You looked inside the car before you saw anything at all is that right?"

"A Yes."

"Q Now, then, you looked in the car before you saw anything at all and then you said to Mr. Gianfrancesco, "What are you doing, Booze?" is that right?"

"A I probably said something to that effect."

"Q Did he say, "I just came out of the store and I just bought a bathing suit"; did he say that to you?"

"A I don't think he told me that then. I am not sure of what he said then. But after I found the bathing suit, why he said that he said that he just bought it."

"Q Did you learn that he had just gone to that store there, the Atlantic Mills Department Store, to buy a bathing suit, did he tell you that?"

"A He said he just bought it. I don't know where he bought it."

"Q There was a bathing suit?"

"A Yes."

"Q Did it appear to be a new bathing suit?"

"A It was brand new."

"Q Brand new bathing suit?"

"A Yes."

"Q Whether there was a sales slip you don't know?"

Record — Page 40

"A I don't know."

"Q Was it in an Atlantic Mills bag?"

"A It was in a bag."

Record — Page 42

"Q When you arrested Gianfrancesco did you ask him if these slips were his?"

"A I assumed they were his."

"Q Did you ask him whether or not they were his?"

"A I didn't ask him if they were his."

"Q Well, in the course of your police training weren't you told or didn't you ever learn that when you find articles of this type in or about somebody that in normal, ordinary police work or investigation you try to find out who they belong to or who owned them or who had them?"

Record — Page 43

"A It should be done, yes, sir."

"Q But you didn't do it?"

"A No, I did not."

"Q Was there any reason why you didn't do it?"
"A I thought it was evident enough that they were in his possession that they were his."
"Q Well, you knew that you could have asked him, didn't you?"
"A I could have asked him if they were his."
"Q And you didn't ask him?"
"A No, I didn't."
"Q You have never seen Gianfrancesco write anything any time anywhere, is that right?"
"A No, I never saw him write anything."
"Q You have never seen him write his name?"
"A I don't think I have ever seen him write anything, no."
"Q You have never seen him write down any figures?"
"A No."

Record — Page 61

"MR. VAN BROCKLIN: I want to move in evidence State's Exhibits 1 through 5, inclusive, at this time?"

"MR. NYBELL: We object, Your Honor, to the introduction of the exhibits."

"THE COURT: First, are you through with this examination here?"

"MR. NYBELL: If the court please, may I consult with Mr. Williams here?"

"The COURT: Yes."

Record — Page 63

"THE COURT: State's Exhibits 1 through 5 are received in evidence."

"MR. NYBELL: Note our objection, please."

Cross Examination of Officer Francis J. Gallagher by Mr. Nybell

Record — Page 72

"Q Mr. Gallagher, on the afternoon of August 17th you were out looking for a fellow whose name is Johnson, Davis or — "

"A John Thomas."

"Q John Thomas, yes. That was completely unrelated, that investigation and that search had nothing whatsoever to do with Mr. Gianfrancesco?"

Record — Page 73

"A No."

"Q But this was just a man that you were looking for in connection with some criminal activity or suspected criminal activitiy, is that rght?"

"A That is right, sir."

"Q And yet before you started out to look for that man you had a search warrant issued, is that right?"

"A No. We had an arrest warrant."

"Q An arrest warrant. Now, then, you didn't have any arrest warrant for Mr. Gianfrancesco on that day?"

"A No."

"Q Nor any search warrant?"

"A No."

"Q In fact, you just happened to see Mr. Gianfrancesco in that parking lot by accident, is that right?"

"A That is right, sir."

"Q You were looking for somebody else and saw him?"

"A Yes, sir."

"Q When you first saw him he was seated in his car by himself, was he?"

"A That is right."

"Q And were there other cars in the parking lot?"

"A Yes, sir."

"Q Was there other traffic in and around the parking lot, people coming, people going, women shopping, so forth?"

Record — Page 74

"A Yes, sir. There always is out there."

"Q It looked like just a routine, ordinary summer afternoon up on this Atlantic Mills shopping place, is that right?"

"A That is right, sir."

"Q So that when you drove into the lot nothing unusual attracted your attention as a policeman, is that right?"
"A No."
"Q When you saw Mr. Gianfrancesco there was nothing unusual about his appearance or his actions that attracted your attention?"
"A No, I didn't even see him first Patrolman Zins did."
"Q Right. When your brother Officer Zins said, "There is Gianfrancesco," or did he say, "There is Booze?"
"A "There is Booze."
"Q "There is Booze." And did he say to you, "Stop the car"?"
"A Yes, sir."
"Q Did he say anything about, "I am going over and shake Booze up," or "shake Booze down"?"
"A No. He just said, "We will go and shake him up, let him know we are working."
"Q "Shake him up." So that when Zins got out of the car he was just going over to shake Booze up a little bit?"

Record — Page 75

"A It is a common practice. Every time you see one of them on the street you stop them—"
"Q Any time you see anybody at all who you have any reason to or any question about, you go over and shake them up, do you?"
"A I wouldn't say it quite that way —"
"MR. VAN BROCKLIN: Please speak up a little louder."
"A If you see anyone on the street who has been arrested before for various crimes or anything like that you usually go up and talk to them."
"Q Is that called "shaking them up"?"
"A I guess."
"Q That is an expression that you use, is it, "Let's go over and shake him up"?"
"A I think Officer Zins used it. It is an old Army expres-

sion. He and I were in the Army, together. That is probably where he used it."

Record — Page 76

"Q Did you know that Booze used to be a truck driver for the city?"

"A No, I didn't."

"Q Well, did you know that he worked for seven months down there in the Engineering Department or the Street Department?"

"A No, sir."

"Q You never learned that in the course of your investigation as a police officer of these people's activities?"

"A No, sir."

"Q Did you know that he worked for the city on two occasions, if memory serves me correctly."

"A No, sir. I did not know that he had ever worked for the city."

"Q What he has ever done or where he had worked you don't know?"

"A I know he had owned a bar or been Steward in a club several times."

"Q Nothing wrong with operating a bar."

"A No."

"Q Is that what you call a legitimate occupation?"

"A I only said that because that is all I know about his occupation. I mean —"

"Q Is there anything wrong or illegal about managing a club?"

"A No."

Record — Page 84

"Q There wasn't anything about Gianfrancesco's character or reputation or your knowledge of him that caused you any concern at all in walking away and taking care of another piece of police business while Zins talked to Gianfrancesco, was there?"

"A No."

"Q There isn't anything about Booze that would cause you any reason to stay there while Zins was talking to him?"
"A How do you mean?"

Record — Page 85

"Q Well, Booze isn't considered to be a desperate man?"
"A No."
"Q Or a violent man?"
"A No."
"Q Or a dangerous man?"
"A No."
"Q Is that right?"
"A No, I wouldn't consider him that."
"Q Is that right?"
"A I wouldn't consider him that."
"Q Now, then, you have known Mr. Gianfrancesco for how long as a police officer?"
"A As a police officer?"
"Q Yes."
"A Oh, since June."
"Q Did you know him before that as a man who ran a club and who ran a tavern?"
"A I knew him casually."
"Q Just a casual acquaintance?"
"A Yes. I knew who he was. I believe he knew who I was."

Record — Page 90

"Q You booked him, Mr. Gallagher?"
"A I believe I took him up myself and booked him, — I don't think I fingerprinted him, — and signed the docket chart."
"Q You know what charge you booked him on?"
"A Suspicion directly."
"Q Suspicion is the charge that the police officers customarily place against a man when they want to hold him for investigation for a short period?"
"A Yes. This or on a felony."

"Q You know neither under the statutes of Ohio nor under the city ordinances of Youngstown, nor under the laws of the Congress of the United States is there any offense of the crime of suspicion, don't you, do you know that?"
"A Yes, sir."

Record — Page 93

"Q I will withdraw the question.

Now, then, Mr. Gallagher, this arrest that you made, was it made by you or Zins?
"A How do you mean that?"
"Q Who told Mr. Gianfrancesco, "You are under arrest," or did anybody say, "You are under arrest."?"
"A Patrolman Zins did, but, of course, we would both be on the arrest."
"Q Where were you standing or where were you when Zins said, "You are under arrest."?"
"A Slightly to the rear of the car about back by the fender."
"Q And when Zins said, "You are under arrest." you had already transacted this business on the police radio, hadn't you, that took two or three minutes?"
"A Yes, sir."
"Q And you had already parked the car originally and got out and started toward Booze's car and then turned around and walked back?"
"A Yes, sir."
"Q And that took some time, didn't it?"
"A Yes, sir.'
"Q So that Zins had been in and around that automobile for four or five minutes before anybody said he was under arrest, isn't that right?"

Record — Page 94

"A Yes, sir."
"Q And during the four or five minutes that Zins was in the automobile do you know what he was doing?"
"A No sir."

"Q He was looking for something, wasn't he?"
"A Well, I wasn't watching him when I was in the car."
"Q Isn't that why he went over there, was to shake Booze up or shake Booze down?"
"A Shake him up."
"Q Shake him up. So he was over there for four or five minutes shaking Booze up and you don't know how he was shaking him up?"
"A I wasn't there."

"MR. NYBELL: No. That is all. Thank you.

"MR. VAN BROKLIN: That is all, Mr. Gallagher. Thank you."

Cross examination of Officer Thomas Kelty by Mr. Nybell

Record — Page 111

"Q What do you understand by the term "backer" in the numbers business?"
"A That would indicate the person or persons who pays off the numbers when someone hits."

Record — Page 112

"Q Do you know any backers of the numbers business in Youngstown now?"
"A I would say that the Naples are a backer."
"Q Who else besides the Naples are a backer?"
"A You want my supposition, or do you want —"
"Q Yes. I want to find out who, in your expert opinion the backers are."
"A I believe that George Economus is a backer, the Naples brothers."
"Q Go ahead. Is that all?"
"A John Burnich."
"Q All right. Who else is a backer? Burnich, Naples, who else? Economus."
"A That is all that I could say."
"Q You would say that there are three backers: Naples, Burnich, and Economus are backers?"

"A Yes."

"Q Now, then, on August 17, 1962, you never saw Gianfrancesco sell anything, did you?"

"A No, sir."

"Q On August 17, 1962, you never saw Gianfrancesco receive any money, did you?"

"A No, sir."

"Q Have you ever seen Gianfrancesco at any time sell any thing?"

Record — Page 113

"A No, sir."

"Q Have you ever seen Gianfrancesco at any time receive any money?"

"A No, sir."

"Q Read that indictment, will you please, for just a minute."

"A Indictment for promoting a numbers game . . ." —"

"Q Just read it to yourself. I want you to be familiar with it. Now, you think you have read it now so that you understand it?"

"A Yes, sir."

"Q On August 17th you don't know whether or not Gianfrancesco was a backer in the numbers game, do you?"

"A No, sir."

"Q In fact, you said the only backers you know are Naples, Burnich, and you mentioned somebody else, Economus, is that right?"

"A Yes, sir."

"Q Those are the backers, all the backers you know?"

"A Yes, sir."

"Q You never saw Gianfrancesco sell anything, is that right?"

"A No, sir."

"Q And you never saw Gianfrancesco receive any money?"

Record — Page 114

"A No, sir."

"Q Do you know any backers that drive four-year old automobiles?"

"THE COURT: What was that question?"

"MR. NYBELL: Do you know any backers that drive four-year old automobiles?"

"THE COURT: All right. I just didn't hear your question."

"A No, sir."

"Q Backers usually drive newer cars than that, don't they, Kelty?"

"A Yes, sir."

"Q Aren't most of the backers at this time of the year usually down in Florida?"

"A I don't know."

"MR. VAN BROCKLIN: I object to that. He wouldn't know."

"Q All right. At any rate, do you know that Gianfrancesco was a truck driver for the city?"

"A Yes, sir."

"Q Now, you say that Gianfrancesco lived some place else other than Marmion Avenue?"

"A He has given other addresses."

"Q You know he and his wife are separated?"

"A No, sir."

"Q You know he has five children?"

"A I know he has children."

"Q Did you know that he has five?"

"A No, sir."

"Q Do you know that he lives with his mother and father up on East Delason Avenue?"

"A He has given that address at one time or the other."

"Q Well, do you know that he lives there?"

"A No, sir."

"Q You know nothing about the events of August 17, 1962?"

"A No, sir."

"Q Can you look at any one of those slips there and tell us whether or not any of them, or pick out any item in all those slips there that you have examined and tell us whether or not any of them have Gianfrancesco's handwriting on them?"

"A I don't know Gianfrancesco's handwriting."

"Q So whether Gianfrancesco ever had anything to do with any of those slips you don't know?"

"A No, sir."

"MR. NYBELL: That is all, Kelty. Thank you very much."

STATE RESTS

Record — Page 124

"THE COURT: All right."

"MR. VAN BROCKLIN: With that, the State will rest, Your Honor."

"THE COURT: All right."

"MR. WILLIAMS: If the court please, we have a legal question to take up with the court, and we wonder if the jury might be dismissed at this time."

"THE COURT: Defense counsel has a matter of law which they wish to discuss with the court, so the jury will retire at this time to your jury room. Please observe the usual caution until we recall you. Thank you."

Record — Page 125

"(Jury leaves the courtroom.)"

"MR. WILLIAMS: I want to make up the record here."

"Defendant, by his counsel, comes now and respectfully moves the court to suppress the evidence obtained and offered in evidence on the ground that it was obtained in violation of the Constitution of the State of Ohio, Article V and XIV of the Constitution.

"Defendant's counsel further moves the court to arrest the testimony from the consideration of the jury and direct a verdict of acquittal on the ground that the State has not established the essential elements of the offense charged in the indictment.

Defendant's counsel further moves the court to discharge the defendant for the further reason that the evidence uncontradictedly shows there was no basis for the arrest of the defendant, he at the time having not been in the commission of a misdemeanor or a felony.

"I think that is all, Your Honor."

"THE COURT: Each of the motions made by counsel on behalf of the defendant, the defendant being in open court at the time of the making of said motions, are hereby overruled, with exceptions to the defendant."

DEFENDANT RESTS

Record — Page 128

"MR. NYBELL: Does the record show that at the conclusion of all of the evidence and following the resting of the defense's case that the defense renewed all of the motions previously made in this cause?"

"THE COURT: Show that they are all overruled, with exceptions to the defendant."

STATMENT OF TRIAL COURT TO JURY AFTER SEVERAL HOURS OF DELIBERATION

Record — Page 142

"3:30 o'clock p.m."

"(Jury in the courtroom)"

"THE COURT: You are hard-working jurors."

"You will have to stay until you reach a verdict.

So then I would ask you whether there is a reasonable chance of reaching a verdict. Who is your foreman?"

"JURY FOREMAN: I am, Your Honor."

"THE COURT: What do you say?"

"JURY FOREMAN: I wish I knew."

"THE COURT: Give you another half hour?"

"JURY FOREMAN: We are closer to a verdict, but I don't know whether we will ever reach one, to tell you the truth."

"THE COURT: Well, why don't you go and try for another half hour and let the court know by the buzzer when you are ready and we will reconsider this matter at that time. All right. Thank you."

"(Jury leaves the courtroom.)"

EXHIBITS

Record—Page 143

"IN RE: EXHIBITS"

"The following-described exhibits, being too cumbersome to attach to this Defendant's Bill of Exceptions, the same have been placed in a separate envelope and have been duly impounded with the Clerk of Courts.

"State's Exhibit Number 1 (A) through (E): Slips of white paper, with numbers and other data on them, with cardboard:

"State's Exhibit Number 2 (A) through (SS): Slips of white paper, with numbers and other data on them;

"State's Exhibit Number 3 (A) through (L): Slips of white paper, with numbers and other data on them;

"State's Exhibit Number 4: Manila envelope, containing $20.00 in change; '$20 Change' written on envelope.

State's Exhibit Number 5: Manila envelope, initialed by 'Robert R. Zins and Frances J. Gallagher,' with the following written on envelope: '8-17-62 6e Slips and $20 in change

found in docket No. 1066-4067. Anthony Gianfrancesco—in car.'

"State's Exhibit Number 6: Certificate of Title Number 500 055172.

"Defendant's Exhibit Number 1: Pittsburgh Post-Gazette, dated Thursday, February 14, 1963."

APPENDIX C

STATE OF OHIO COUNTY OF MAHONING STATE OF OHIO, Plaintiff vs. ANTHONY GIANFRANCESCO, Defendant	ss	IN THE COURT OF COMMON PLEAS CASE NO. 21776 MOTION TO SUPPRESS

Now comes the defendant, by his counsel, and represents to the Court that he has been reliably informed that the State of Ohio will seek to offer in evidence certain slips of paper, books with numbers, and other data which were taken from defendant's automobile on the 17th day of August, 1962. The books, papers, numbers and other data so taken were obtained and seized by an illegal search and without warrant, in violation of the Bill of Rights and the Constitutions of the State of Ohio and the United States.

By reason of the foregoing, counsel for defendant files this, his Motion to Suppress all evidence so obtained, which is in the hands of the Prosecuting Attorney, investigating officers and/or arresting officers, and to direct those so possessing said articles obtained in the fashion hereinbefore described to the defendant prior to the trial of this cause.

Counsel for defendant further respectfully moves the Court that this Motion be set for oral hearing at a time convenient to the Court so that evidence may be introduced in support of this Motion.

/s/ Edward L. Williams
EDWARD L. WILLIAMS
1101-3 Union National Bank Bldg.
Youngstown 3, Ohio
Attorney for Defendant

Brief in Support of Motion

The automobile of the defendant was searched without a search warrant.

The State will attempt to offer evidence obtained by reason of an unlawful search and seizure without a search warrant in violation of the Constitution of the United States and the Constitution of the State of Ohio and the Bill of Rights. For that reason, we respectfully submit that the Motion to Suppress should be sustained and that any and all evidence obtained by reason of unlawful search and seizure and without warrant should be held to be in violation of the Federal and State Constitutions.

The Court's attention is directed to the case of Mapp vs. State of Ohio, 367 U. S., 643; 6 L. Ed. 2d, 1081, 81 S. Ct. 1684, 84 A. L. R. 2d, 933.

Also: *Young vs. Commonwealth of Kentucky*, 230 Ky 767, 20 S. W. 2d, 730, wherein it was held:

> "Opening of door of car to get shelter will not justify search without warrant if liquor not disclosed to view before door was opened."
>
> In the instant case, the facts are almost identical.
>
> See also: *State vs. Mendel*, 5 O. O., 312, syl. 3:
>
> "Before an officer is entitled to search one's person or premises without a search warrant, he must have some information concerning a violation of the law, and where the defendant has violated no statute, law, or ordinance or done anything which would give the officer a reasbn for the arrest, the arrest and search is unlawful though the one arrested and searched is found to be transporting liquor contrary to law."

Respectfully submitted,

/s/ Edward L. Williams
1101-3 Union National Bank Bldg.
Youngstown 3, Ohio
Attorney for Defendant

Copy of foregoing Motion to Suppress
and Brief acknowledged this 10th
day of December, 1962.

LOREN VAN BROCKLIN
Acting Prosecuting Attorney
By */s/ C. W. Osborne*